

TJAGSA Practice Note

Faculty, The Judge Advocate General's School, U.S. Army

Changes for United States Army Reserve Component Officer Involuntary Separation Boards

The Reserve Officer Personnel Management Act¹ (ROPMA) makes a notable change to the composition of United States Reserve Component officer elimination board panels.² As of 1 October 1996, any officer who serves on a United States Army Reserve Component officer elimination board must be a colonel and also must be senior in grade and rank to any respondent whose status is being considered by the board.³

The new "colonels and above" requirement may significantly impede Army Reserve readiness when a command's senior leadership is sitting on officer elimination boards, rather than utilizing precious training time for command and staff duties. As an alternative, reserve commands, working with the Army Reserve Personnel Command (ARPERSCOM), should identify local area Individual Ready Reserve and Individual Mobilization Augmentee colonels who may be willing to serve as officer elimination board members.⁴

The Army National Guard, which often conducts concurrent boards for withdrawal of federal recognition and officer elimi-

nation, may now have difficulty in using the same board for both actions. Army National Guard officers who have lost their federal recognition become members of the Individual Ready Reserve (U.S. Army Reserve) upon losing their Army National Guard status.⁵ Once a National Guard officer becomes a member of the Individual Ready Reserve, the ROPMA's requirements as to Reserve officer elimination actions are triggered.⁶

On 3 July 1997, the Commander, U.S. Army Reserve Command (USARC), published additional guidance for U.S. Army Reserve Regional Support Commands (RSCs) and Direct Reporting Commands (DRCs) in response to the ROPMA elimination board composition change.⁷ The guidance delegates to the RSCs and DRCs the authority to initiate officer separation actions, to appoint and to convene boards of inquiry (BOIs), and to take action on the boards' findings and recommendations.⁸ The guidance also directs U.S. Army Reserve commanders, acting as appointing authorities, to sign each Report of Proceedings by Investigating Officer/Board of Officers personally and to forward each officer separation board packet through the USARC Deputy Chief of Staff Personnel section to the ARPERSCOM commander for final separation action on behalf of the Secretary of the Army.⁹ The USARC delegation memo superseded a USARC directive on Reserve

1. Pub. L. No. 103-337, 108 Stat. 2957 (1994) (codified in various sections of Titles 10 and 32, United States Code). The ROPMA refers to involuntary officer separation boards as "boards of inquiry" (BOIs). United States Army National Guard and Army Reserve officer elimination boards are governed by *Army Regulation 135-175*, rather than by the active component officer separation regulation, *Army Regulation 600-8-24*. Compare U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS (22 Feb. 1971) [hereinafter AR 135-175], with U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (21 July 1995) [hereinafter AR 600-8-24]. *Army Regulation 600-8-24* applies to Regular Army officers and to reserve component officers who are on active duty status for a period of 30 or more consecutive days. Headquarters, Department of the Army Deputy Chief of Staff for Personnel, is currently revising *Army Regulation 135-175*.

2. Federal withdrawal of recognition boards for Army National Guard officers are not technically officer separation boards under Title 10 of the U.S. Code; thus, they are arguably not affected by the ROPMA's separation board provisions. See 10 U.S.C.A. § 323(b) (West 1997); U.S. DEP'T OF ARMY, NAT'L GUARD BUREAU REG. 635-101, EFFICIENCY AND PHYSICAL FITNESS BOARDS (15 Aug. 1977) [hereinafter NGR 635-101]. The ROPMA does, however, have a provision which deals with federal withdrawal of recognition boards. 10 U.S.C.A. § 14907.

3. Pub. L. No. 103-337, 108 Stat. 2957, codified at 10 U.S.C. § 14906(a). There is a similar requirement for active component Army officer elimination boards. See AR 600-8-24, *supra* note 1, para. 4-7a. Congress considered legislation to change reserve component officer board membership to an officer holding a grade above major/lieutenant commander (O-4) rank and higher, which would have alleviated this problem, but it was deleted from the final version of the National Defense Authorization Act for Fiscal Year 1998. See H.R. 1119, 105th Cong., § 516, H.R. REP. NO. 105-32 (16 June 1997); National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629 (1997).

4. Reserve commands may reach ARPERSCOM Officer Personnel Management Directorate by writing to U.S. Army Reserve Personnel Command (ARPERSCOM), ATTN: ARPC-OP, 9700 Page Avenue, St. Louis, MO 63132-5200, or by calling (314) 592-0664. Individual Ready Reserve and Individual Mobilization Augmentee officers can get up to two retirement points per eight-hour period for sitting as an elimination board member for either Army Reserve or Army National Guard officer boards. U.S. DEP'T OF ARMY, REG. 140-185, TRAINING AND RETIREMENT POINT CREDITS AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS, para. 2-4b(3) (15 Sept. 1979) [hereinafter AR 140-185].

5. See 10 U.S.C.A. § 12213(b); NGR 635-101, *supra* note 2, paras. 6b, 17c; AR 135-175, *supra* note 1, paras. 1-13g, 1-13h, 2-2b.

6. It is the opinion of members of the National Guard Bureau Chief Counsel's Office that once Guard officers have properly had their federal recognition withdrawn by board action they are automatically subject to discharge without another board to separate them from the Individual Ready Reserve. See AR 135-175, *supra* note 1, paras. 2-8b, 2-8c, 4-1b.

7. Memorandum, Commander, U.S. Army Reserve Command (USARC), AFRC-PRO, to Commanders, USARC MSCs [Major Subordinate Commands], subject: Delegation of Authority to Initiate and Convene Officer Involuntary Separation Boards (3 July 1997) [hereinafter USARC Delegation Memo].

Component Officer Involuntary Separation Boards, which was dated 20 November 1996.¹⁰

As of 3 July 1997, all officer boards of inquiry (BOIs) which are initiated by RSCs or DRCs must meet certain composition-requirements. First, all BOIs will have one Regular Army voting member (colonel or above), if available, or a "Reserve officer who is serving on active duty" (colonel or above; e.g., an Active Guard Reserve colonel) if no Regular Army officer is readily available.¹¹ Second, at least one of the voting board members should be of the same branch as the respondent, "if possible."¹² Third, at least one voting member of the board should be of the same sex as the respondent, "if reasonably available."¹³ Fourth, upon timely request by the respondent, at

least one voting member of the board should be a minority, "if reasonably available."¹⁴ Currently, there is no regulatory or statutory requirement to have a reserve officer board member who is the same race as a minority respondent.¹⁵ The USARC delegation memorandum does not specify who is a minority.¹⁶

What do these changes mean for U.S. Army Reserve recorders and personnel officers who are responsible for obtaining active and reserve component colonels to sit on Reserve officer BOIs? Command officials must now be cognizant of minority status, as well as the sex and branch of respondent officers; all of these factors must now be considered when assembling BOI panels. Additionally, BOI members should be screened to ensure that there are no rater/rated officer conflicts or supervi-

8. *Id.* The memorandum provided:

Pursuant to AR 135-175, paragraph 1-3a(3), you are hereby delegated the authority to process separation actions for officers assigned to troop program units within your command. This delegation includes the authority to initiate separation actions, [to] appoint and [to] convene boards of inquiry (BOI), and [to] take action on the boards' findings and recommendations. You are not authorized to take final action approving the retention or separation of officers referred to a BOI. Commander, ARPERSCOM, retains final retention and separation approval authority (AR 135-175, para. 2-20.1). Delegated functions include separation actions for:

- a. Chapter 2-11, Substandard performance of duty;
- b. Chapter 2-12, Moral or professional dereliction;
- c. Chapter 2-13, Failure to meet medical fitness standards at the time of appointment;
- d. Chapter 2-14, In the interest of national security; [and]
- e. Chapter 4, Removal from active status (when BOI required).

This delegation of separation authority is effective as of the date of this memorandum.

Id. paras. 2, 3.

9. *Id.*

10. Memorandum, Commander, U.S. Army Reserve Command, AFRC-PRO, to USAR Commanders, subject: Change to Board Composition Concerning Officer Involuntary Separation Boards (20 Nov. 1996). The memorandum added the following requirements to BOIs appointed by the USARC:

Further, one of the voting members will be active component if reasonably available. If an active component officer is not available, a reserve officer on active duty (AGR) may be substituted by submitting a statement in writing to the convening authority stating that an active component officer is not available. One of the three voting members should also be of the same branch as the officer being boarded, if possible. When a minority officer is being considered for separation, at least one of the voting members must be of the same sex and or race, if reasonably available.

While the law came into effect on 1 Oct 96, the board composition requirements outlined above are only for boards *initiated* on or after that date. For purposes of board composition, initiation means at the time respondent is referred to a board of officers.

Id. paras. 3, 4. Neither this memo nor the USARC delegation memo subjects non-USARC reserve component units to the additional USARC officer board requirements.

11. 10 U.S.C.A. §§ 14906(a) (West 1997); AR 135-175, *supra* note 1, para. 2-25a(1). The ROPMA requirement for a colonel or above active component voting member to sit on USAR officer BOIs will create additional challenges for reserve commands. The most likely active component candidates for such duty will probably be each RSC's senior Army advisor, where that Regular Army officer is at least a colonel, or one of the RSC senior (colonel) full-time AGR staff officers, where no Regular Army colonel is readily available.

12. See AR 135-175, *supra* note 1, para. 2-25a(4). Reserve officers do not have to affirmatively request same branch board representation. *Id.* But see AR 600-8-24, *supra* note 1, para. 4-7d (providing that a respondent for an active component officer elimination board may request to have a member on the board who is of the same branch as the respondent if the respondent is a "special branch" officer (e.g., Army Medical Department, Chaplains Corps, or Judge Advocate General's Corps) and such a board member is reasonably available; a board member who is of the same branch as the respondent is not an entitlement). If an active component officer is being boarded for substandard performance of duty, the respondent may request that a member of the board be of the same branch as the respondent, regardless of whether the respondent is in a "special branch." *Id.* para. 4-7e.

13. AR 135-175, *supra* note 1, para. 2-25a(5). A respondent in the reserve component does not have to request same sex representation, but a respondent in the active component must request same sex representation within a specified time period. AR 600-8-24, *supra* note 1, para. 4-7d (providing that the request is waived if it is not timely).

sor/subordinate conflicts. If no officers who meet the minority status, sex, and branch of the respondent are appointed, Army Reserve personnel officers and command judge advocates should document why such officers were not made available for the board.¹⁷ The documentation should be included in the separation packet prior to approval by the appointing authority.

Army Reserve commands should plan ahead to locate available colonels, both active and reserve component, to sit as voting BOI members. Commands should plan additional processing time for their officer elimination actions to account for the new colonels and above requirement for panel members. As soon as a reserve officer elimination case is received from a unit, efforts should be made to start identifying potential colonel officer board members. The creation of standing board panels, with several alternates that include female and minority officers, would assist commands in board scheduling and conflict resolution.¹⁸

To ensure proper board composition and to avoid unnecessary delays, the RSC/DRC staff judge advocate sections should review the proposed board composition before sending an officer BOI packet to the appointing authority for the appointment of board members. Command judge advocates should review each packet to ensure that: there is sufficient evidence for a prima facie case; the procedural paperwork is in order; and the directives for officer board membership have been met.¹⁹ A legal review which is conducted prior to appointment of the board should be part of the appointing authority separation packet in each officer case. Command judge advocate pre-screening of board members is not time-consuming and eliminates potential board challenges.

Respondents' counsel need to act quickly to preserve their clients' right to minority representation on officer elimination boards. The USARC delegation memorandum provides for a fifteen-day window to request minority board membership, starting from the date the respondent receives notice of the separation proceeding.²⁰ A respondent's failure to request minor-

14. AR 135-175, *supra* note 1, para. 2-25a. The USARC delegation memo states:

When the respondent is a minority member, the board will, upon the respondent's written request, include a minority officer as a voting member, if reasonably available. This is not an entitlement. If a minority member is not reasonably available, the separation action may continue without a minority voting member on the BOI. Requests for a minority member will be made within 15 days of receipt of the memorandum notifying the officer of the initiation of the separation action. If the memorandum is undeliverable, or the respondent refuses delivery, the 15-day requirement begins from United States Postal Service confirmation of attempted delivery/delivery refusal. Failure to exercise the right to request a minority BOI member within these guidelines constitutes a waiver of that option.

USARC Delegation Memo, *supra* note 7, para. 4(c).

15. *But see* U.S. DEP'T OF ARMY, REG. 135-178, SEPARATION OF ENLISTED PERSONNEL, para. 2-12a(3) (1 Sept. 1994) [hereinafter AR 135-178] (providing that female and minority members should be provided an opportunity to serve on reserve enlisted separation boards). The mere appointment or failure to appoint a minority or female to an enlisted elimination board "does not provide a basis for challenging the proceedings." *Id.* para. 2-12a(3). In contrast, the USARC delegation memorandum has no such disclaimer regarding officer board minority member requests. For active component officer elimination boards, a minority, female, or special branch officer will be appointed to the board as a voting member only upon written request and only if reasonably available. AR 600-8-24, *supra* note 1. Under the regulation, a request for a minority, female, or special branch board member is not an enforceable entitlement, and such a request is waived if the respondent does not submit the request within seven days from notification of separation proceedings. *Id.* Similarly, the USARC delegation memorandum provides that a reserve officer minority member request "is not an entitlement" and that the request is waived if it is not made within fifteen days of separation notice. USARC Delegation Memo, *supra* note 7.

16. "Minority groups" are defined as "any group distinguished from the general population in terms of race, color, religion, gender, or national origin." AR 140-185, *supra* note 4, glossary (1 Sept. 1994). This very broad definition of "minority" includes not only race, color, or national origin, but also gender and religion. *See* U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL, PERSONNEL SEPARATIONS, glossary (17 Sept. 1990) [hereinafter AR 635-200]. Under *Army Regulations 135-175* and *600-8-24*, gender is treated separately from minority status. There is no definition of "minority" or "minority group" in the active component officer separation regulation, *Army Regulation 600-8-24*. The active component enlisted separation regulation makes a useful suggestion regarding minority membership on separation boards; it suggests that the requested minority board member "should normally be of the same minority group as the respondent." *Id.* para. 2-7b(5).

17. If minority, female, or branch-specific members are not reasonably available, the government should document that it attempted to obtain such members. *Cf.* AR 635-200, *supra* note 16, para. 2-7b(5) (providing that when a minority board member is not available "the reason will be stated in the record of proceedings"). While the racial makeup of a reserve officer administrative elimination board panel is not specifically listed as grounds to challenge the panel for cause under *Army Regulation 135-175*, paragraphs 2-25c(4) and 2-25d, respondent's counsel should object to a failure of the command to make any effort to seek out minority, female, or same branch board members. In support of the objection, counsel should argue that the lack of effort is a substantial error that has a material adverse effect on the respondent's right to a fair hearing. *See* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 2-3c(3) (11 May 1988) [hereinafter AR 15-6].

18. Prior to the convening of the board, the command staff judge advocate may excuse board members and substitute board alternates who are already appointed. AR 15-6, *supra* note 17, para. 5-2a. The reasons for excusal include indication of a conflict, disqualification, or inability to serve. *Id.* The appointing authority should provide an express written delegation of authority to the command staff judge advocate to prevent challenges to such excusal actions. In cases where a respondent timely requests same sex, same branch, or minority members, the appointing authority should be prepared to specifically appoint such members, if reasonably available and not already members of standing BOI panels.

19. At a minimum, the board membership requirements of *Army Regulation 135-175*, paragraph 2-25, should be met prior to presenting the board packet to the appointing authority.

ity board membership within the fifteen-day window results in waiver of the government's obligation to appoint a minority board member. If the respondent makes a timely request for minority representation on the board and no minority members were appointed, the government should be prepared to explain why. In the absence of a reasonable explanation by the government, respondent's counsel should object to the board being seated and should renew the objection upon the opening of the board hearing.²¹

While not required by regulation, respondent's counsel should also draft a post-board memorandum to the command staff judge advocate and raise again the issue of improper BOI composition, as well as any other procedural or substantive errors. Respondent's counsel should provide the legal reviewer reasons to overturn the board results. Prior to the command's legal review after the board, respondent's counsel should also review the summarized transcript of the board proceeding to

ensure accuracy, especially as to whether important objections were recorded. Counsel's input on potential errors of law and fact can assist the command staff judge advocate in providing an adequate legal review and in properly advising the appointing and separating authorities.²²

The ROPMA has inspired several important changes to Army Reserve Component procedures in conducting officer separation boards. The ROPMA requires higher-ranking board members, which has an adverse impact on unit training and readiness. Army National Guard joint federal withdrawal of recognition and officer separation boards may be affected. Additionally, the USARC delegation memorandum, which establishes other criteria for board membership, raises new questions and challenges for commands and counsel.²³ Lieutenant Colonel Conrad.

20. USARC Delegation Memorandum, *supra* note 7.

21. Failure to object during the board proceedings waives any board composition error. AR 15-6, *supra* note 17, para. 2-3c(4). Respondent's counsel should ensure that the board transcript reflects the objection and should create a record that can eventually be used to raise the issue of race/gender bias in the board selection. *See generally* U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTIONS OF MILITARY RECORDS (18 May 1977). Respondent's counsel should be prepared to challenge whether the government made any effort to contact minority, female, or same branch officers who could have been seated on the BOI panel. In making these arguments, there are several pieces of evidence which can be helpful: statistical evidence that the command has a particular percentage of minority, female, or same branch officers in the grade of colonel or above; lists of those officers; and sworn affidavits indicating that they were never contacted by the command. *Cf.* United States v. Moore, 28 M.J. 366 (C.M.A. 1989); AR 135-175, *supra* note 1, para. 2-27b(6). While there is no Sixth Amendment right to a jury in a military BOI proceeding, such proceedings must meet minimal standards of fairness and procedural due process. *See* Holley v. United States, 124 F.3d 1462 (Fed. Cir. 1997); Perez v. United States, 850 F. Supp. 1354 (N.D. Ill. 1994); AR 135-178, *supra* note 15, paras. 1-8, 11-15; AR 135-175, *supra* note 1, paras. 2-3 through 2-5. Where military regulations or directives provide certain respondent rights for involuntary separation proceedings, the government must comply with its own directives or regulations. *See* Casey v. United States, 8 Ct. Cl. 234, 241 (1985); Faircloth v. United States, 186 Ct. Cl. 133 (1968); Keef v. United States, 185 Ct. Cl. 454 (1968); Birt v. United States, 180 Ct. Cl. 910 (1967). Respondents' counsel, by analogy, may argue that the failure of a command to make any reasonable attempt to place minority or female officers on a minority or female respondent's BOI panel is a violation of fundamental fairness and minimal due process, which constitutes a substantial error and voids the board's results.

22. *See* AR 135-178, *supra* note 15, paras. 2-21c, 2-22; AR 15-6, *supra* note 17, paras. 3-18 and 5-10.

23. The opinions expressed in this note are solely the author's and are not those of The Judge Advocate General's Corps, U.S. Army; the U.S. Army Reserve Command; the National Guard Bureau; or the U.S. Army Deputy Chief of Staff, Personnel Policy.